

Editor's note: Appealed -- aff'd, Civ.No. 87-2669 (D.D.C. Oct. 11, 1988), aff'd, 895 F.2d 780 (D.C. Cir. 1990), petition for cert denied, No. 89-1728 (Oct. 1, 1990), 111 S.Ct. 47, 498 U.S. 811

WESTERN FUELS-UTAH, INC.

IBLA 85-459

Decided June 16, 1987

Appeal from a decision of the Colorado State Office, Bureau of Land Management, overruling objections and readjusting coal lease C-023703.

Affirmed in part, set aside in part, and remanded.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment

Notice of intent to readjust a coal lease given to a lessee prior to expiration of the period allowed for readjustment is effective to permit readjustment, even though BLM does not provide the specific terms or conditions for readjustment until after the expiration of the period.

2. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment

If, based on information obtainable from the results of operations or from information available in a resource recovery and reclamation plan, it can be established that conditions warrant doing so, the authorized officer may set a royalty rate for an underground mine at less than 8 percent but not less than 5 percent.

APPEARANCES: Edward Weinberg, Esq., Washington, D.C., for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Western Fuels-Utah, Inc. (Western), has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated February 7, 1985, which readjusted certain terms and conditions of its coal lease C-023703 and overruled its objections to the lease readjustment.

The record shows that preference-right coal lease C-023703 was originally issued effective March 1, 1963, to a predecessor in interest of

Western, the present lessee. ^{1/} The lease was issued under the authority of the Mineral Leasing Act (MLA) of February 25, 1920, 30 U.S.C. § 207 (1982). Pursuant to the statute and the express terms of section 3(d) of the lease, BLM retained the right to readjust and fix royalties and other terms and conditions of the lease at the end of 20 years, that is, as of March 1, 1983.

On May 17, 1982 (10 months prior to the end of the 20-year period), BLM informed Western that the terms and conditions of its lease would be readjusted under the provisions of 43 CFR 3451.1. The notice specifically stated: "A notice containing the readjusted terms and conditions will be forwarded to you on or before May 17, 1984. The readjustment will become effective 60 days after your receipt of that notice."

By notice dated May 3, 1983, BLM tendered the proposed terms and conditions of the readjusted lease, citing section 3(d) of the lease. The notice of proposed readjusted lease terms provided a 60-day period from date of receipt for filing objections. Western filed an objection on July 18, 1983, objecting to the readjustment as being untimely and unauthorized under section 7 of the Mineral Leasing Act.

At the time of issuance of the original lease, section 7 of the MLA, 30 U.S.C. § 207 (1958), provided:

Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine unless otherwise provided by law at the time of the expiration of such periods.

Section 7 of the MLA was amended by section 6(a) of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 207(a) (1982), to read in pertinent part: "Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended."

In addition, section 3(d) of each lease specifically provides:

The lessor expressly reserves * * *:

* * * * *

(d) Readjustment of terms. The right reasonably to readjust and fix royalties payable hereafter and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the

^{1/} The original lessee for this lease was Moon Lake Electric Association, Inc. of Vernal, Utah, which assigned its interest in the lease to Western effective May 21, 1981.

continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

Western has appealed the BLM decision of February 7, 1985, contending that when it readjusted the terms and conditions of the lease 2 months after the end of the 20-year term of the lease, it failed to readjust the lease in a timely manner. Further, appellant contends that the BLM notice of proposed readjustment of May 1982 was inadequate, lacking in crucial information, and insufficient to satisfy the statutory and contractual deadline. Appellant asserts:

The May 1982 notice was issued pursuant to 43 CFR 3451.1(c)(1). That regulation requires that "prior to the expiration" of the lease term, BLM shall "notify" the lessee whether an adjustment will be made "prior to the expiration of the initial 20-year period." * * * [T]he only logical explanation for the second "prior" is that the actual lease modifications must be made "prior" to the end of the lease term.

(Statement of Reasons at 5). Appellant contends that BLM's reliance upon Kaiser Steel Corp., 76 IBLA 387 (1983), and Gulf Oil Corp., 73 IBLA 328 (1983), is misplaced and that such cases were wrongly decided and should not control the outcome in this case.

[1] The primary question in this case has recently been addressed by the United States Court of Appeals for the Tenth Circuit. In Coastal States Energy Corp. v. Hodel, Civil No. 86-1301, on April 9, 1987, the Circuit Court held a readjustment of a coal lease to be timely when BLM notified the lessee of its intent to readjust the lease prior to the anniversary date of the lease. BLM's notice of intent to readjust coal lease C-023703 was given to Western more than 10 months prior to the 20-year anniversary date of the lease. The notice conforms to the Department's regulations and satisfies the minimum requirements of the law. Accordingly, we conclude that BLM's readjustment of lease C-023703 was timely under the statutes and regulations.

Pursuant to the determination in Coastal States, we affirm BLM's readjustment decision on all points but one. In Coastal States, the court did not agree with this Board's ruling in that case with respect to the royalty rate applied to underground mines. The Board had applied a BLM interpretation of 43 CFR 3473.3-2(a)(3) as requiring an 8-percent royalty rate on all coal removal from an underground mine. See Coastal States Energy Co., 70 IBLA 386, 393 (1983). The regulation provides:

A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant.

In reversing this holding, the court noted that it was an error to fix the readjusted royalty rate at 8 percent for all underground coal, since such

an approach "completely ignores the ensuing proviso in the same regulation that a lesser amount, but not less than 5%, may be set 'if conditions warrant.'" Coastal States Energy Co. v. Hodel, *supra* (Memorandum Opinion at 12). In so holding, the court noted that its interpretation of the regulation was in accord with the interpretation espoused by this Board in a more recent case, Utah Power & Light, 80 IBLA 180 (1984).

The remaining question in the case now before us is whether a royalty rate of less than 8 percent could be justified because the conditions warrant a royalty rate of less than 8 percent.

Both Coastal States and Utah Power & Light involved on-going underground mine operations. Although the file in this case contains no indication that there is presently an underground operation on the lease premises, there are indications that one was contemplated and that a resource recovery and protection plan for the operations (see 43 CFR 3482.1(b)) may have been tendered. In the absence of either evidence of on-going underground mining operations or a specific proposal to commence underground mining, we have no way of knowing whether the lessee can establish that "conditions warrant" a royalty rate of less than 8 percent for coal removed by underground operations. Accordingly, we affirm the imposition of the 12-1/2-percent royalty rate for coal removed by surface operations, set aside the BLM decision to the extent that it has set an 8 percent royalty rate for coal removed by underground operations, and remand the file to BLM in order that BLM may undertake the necessary review and determine whether conditions warrant a royalty rate of less than 8 percent, but not less than 5 percent.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Office, BLM, is affirmed in part, set aside in part, and remanded.

R. W. Mullen
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

John H. Kelly
Administrative Judge

